Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1997

DAVID WALKER,
Petitioner,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.,
Respondent.

Petition For A Writ Of Certiorari
To The United States District Court
For The District of Columbia

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States District Court of Appeals for the District of Columbia transfers the Appellant case to the United Stated District for the Southern Division of Michigan will deny the Appellant his Fourth Amendment due process rights, and if not:

a. Whether the transfer of Appellant's case will deny the Appellant a review of the Bell, GTE and Michigan Public Service Commission obligations to provide the Appellant as an information provider with service in accordance with the Baby Bell Consent Judgment in **United States v AT&T** 552 F. Supp 131 (D.D.C. 1982) Aff'd mem sub nom, **Maryland v United States**, 460 U.S. 10001 and the GTE Consent Decree in **United States v GTE** 603 F. Supp 703 (D.D.C.1984), because United States District Court of Columbia has jurisdiction of consent decrees for compliance and enforcement.

b. Whether the transfer of Appellant's case will refuse to allow the Appellant a Judicial Review of the Justice Department determination in accordance with the Administrative Procedure Act Section 10 .

c. Whether the United States Department of Justice has made a record of the Appellant's determination with a view toward (a) reconsideration by the agency itself, and (b) providing an adequate factual record as the basis for judicial review by the District Court of Columbia that has retained jurisdiction over enforcement and

compliance of the consent decrees. Whether Bell, GTE and The Michigan Public Service Commission have violated the Appellants First and Fifth Amendment Rights to provide information to the public granted by the consent decrees to be review by the United States District Court of Columbia.

PARTIES TO THE PROCEEDING

David Walker, Respondent and Plaintiff-Appellant is the developer, creator and President of Information Provider Corporation and is resident of Whitehall, Michigan.

Petitioner; Defendant - Appellee below.

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Respondents; Plaintiffs - Appellants below.

TABLE OF CONTENTS

QUESTIONS PREENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

JURISDICTION 1

STATEMENT OF FACTS 1

ARGUMENT 7

SUMMARY 29

CONCLUSION 30

APPENDIX:

Appendix A

United States Court of Appeal
District of Columbia:
Decision . . . . . A
Order Denying Petition for Rehearing . . . . . A

Appendix B

Testimony Ann K Bingman . . . . . B

Appendix C

Michigan Bell Ameritech Violations Stated by United States Justice Department C

TABLE OF AUTHORITIES

AT&T v McCaw Appeal
46 F. 3d 9

Rufo v Inmates of Suffolk Jail
502 U.S. 367, 383 (1972) 8

United States v United Shoe Machinery
391 U.S. 244, 248 (1968) 9

United States v AT&T
552 F. Supp 131 (D.D.C. 1982) 1,5,6,23,24,25,30

United States v GTE
603 F. Supp 703 (D.D.C.1984) 1,26

United States v Western Electric
578 F. Supp 677 2

United States v Western Elec. Co,
12 F. 3d (D.C. Cir. 1993) 7

United States v Western Elec. Co.
846 F. 3d 1422, 1427-30 (D.C. Cir. 1988) 8,26

United States v Western Elec. Co.
849 F. 2d 430 21

Administrative Procedure Act Section 10,11,12

First and Fifth Amendment 27,28,29

Fourteenth Amendment 30

JURISDICTION

This Petition for Writ of Certiorari seeks the discretionary review of the decision of the United States District Court of Columbia which was subject to a Motion for Rehearing and Reconsideration filed on December 2, 1997 denied December 19, 1997 Denial for Rehearing is reproduced in Petitioner's Appendix at **Appendix A** References to the decision on the merits herein will be to the official report. Statutory basis for review by certiorari being sought hereunder is 28 U.S.C.S. 1254 (1), U.S.C.S. 2101 (c). This jurisdiction if further elaborated in the Rules of the Supreme Court of United States, Part III, Rules 10, 12, 13, and 14.

STATEMENT OF FACTS

APPELLANT DEVELOPED A CORPORATION BASED UPON THE BREAK UP OF THE BABY BELLS CONSENT JUDGMENT AND THE GTE CONSENT DECREE AS CITED IN UNITED STATES v AT&T 552 F. Supp 131 (D.D.C. 1982) AFF'D MEM SUB NOM, Maryland v United States, 460 U.S. 10001 (1983) AND THE GTE CONSENT DECREE IN United States v GTE 603 F. Supp 703 (D.D.C.1984),.

Appellant brought its complaint to the United States District Court of Columbia for the phone companies Michigan Bell and GTE refusal to provide it with service in violation of the Consent Decrees **United States v AT&T 552 F. Supp 131** (D.D.C. 1982) aff'd mem sub nom, **Maryland v United States**, 460 U.S. 10001 (1983) and violation of the GTE consent decree in **United States v GTE 603 F. Supp** 703 (D.D.C.1984). Appellants complaint was also for violation antitrust laws, First Amendment, Fifth Amendment and Fourteenth Amendment rights and breach of contract. Appellant complaint is also filed against Michigan Public Service Commission for refusing to follow

the federal consent decrees mandated to the states.

The United States District Court of Columbia retained jurisdiction to enforce the consent decrees. Appellant in accordance in **U.S. v Western Electric** 578 F. Supp 677 (D.C.C. 1983) order filed an application as a third party for enforcement with the Justice Department for Bell refusal to provide the Appellant with service. Justice Department failed to take action for over three years.

The Appellant filed his case with the United States District Court of Columbia. The United States District Court of Columbia in error transferred the Appellants case to the United States District Court for the Western District of Michigan for lack of jurisdiction. The United States District Court of Columbia stated in its order on:

On June 25, 1997 this Court issued an Order transferring this matter because venue did not lie in the District of Columbia.

Appellant appealed the District of Columbia order to the United States Court of Appeals for the District of Columbia Circuit. **THE ONLY ORDER ON APPEAL WITH THE UNITED STATES COURT OF APPEALS WAS THE VENUE AND JURISDICTION OF THE UNITED STATES DISTRICT COURT OF COLUMBIA TO DETERMINE THE APPELLANT'S FEDERAL QUESTIONS OF LAW.**

The Appellant submitted the evidence of venue and jurisdiction to the United States District Court of Appeals that the District Court of Columbia has jurisdiction over the consent decrees as cited in **U.S. v Western Electric 578 F. Supp** 677 (D.C.C. 1983). The Court of Appeals determination stated that the Appellant was correct as to the venue and jurisdiction as the following cites:

"Ordered that the petition for a writ of mandamus be

denied. Mandamus is an extraordinary remedy and only appropriately granted when a petitioner's right to relief is clear and indisputable. See Allied Chemical Corp. v Daiflon, Inc., 449 U.S. 33, 34-45 (1980) (per curiam). Notwithstanding any error in applying the enforcement provisions of U.S. v Western Electric 578 F. Supp. 677 (D.C.C. 1983, the District Court's order transferring petitioner's complaint was proper in light of petitioner's failure to demonstrate a meritorious claim for enforcement or to show that the Department of Justice refused in bad faith to act on his prior complaint." Id., 578 F Supp at 670-80

United States District Court of Columbia in **U.S. v Western Electric** 578 F. Supp. 677 (D.C.C. 1983) order stated the Appellant application as a third party would be considered if the Department of Justice refused, in bad faith, to commence enforcement proceedings as the following cites.

" If a third party applies for specific enforcement to the Department of Justice and thereafter demonstrates to the Court that, although the application is meritorious, the Department has refused, in bad faith to commence enforcement proceedings, the Court will consider the application."

APPELLANT HAS PROVIDE THE UNITED STATES DISTRICT COURT OF COLMBIA AN ADMISSION OF FACTS, OFFER OF PROOF AND A MOTION TO OFFER PRIMA FACIA EVIDENCE AS TO THE VIOLATIONS OF APPELLEES WITH THEIR REFUSAL TO ABIDE BY THE CONSENT DECREES. THE EVIDENCE REQUIRES A DETERMINATION BY THE DISTRICT COURT OF COLUMBA FOR JUDICIAL REVIEW BECAUSE IT RETAINED JURISDICTION OVER THE CONSENT DECREES.

Appellant proof and evidence states as fact the obligations of the phone companies and the state agencies

like the Michigan Public Service Commission to provide the Appellant with service. The evidence clearly states Appellant's right to relief from a Justice Department determination is clear and indisputable based upon the proof and evidence provide to the court that Bell, GTE and the Michigan Public Service Commission had an obligation to provide the Appellant as information provider with service as cited by the 1982-2 Trade Cases U.S. v Western Electric Co., Inc.(Emphasis Added)

"The Bell Operating Companies divested by American Telephone and Telegraph Co. under a consent decree were required to provide to all interexchange carriers and information service providers, on a regulated basis, access and services equal in type, quality and price as that provided to AT&T. 72,556 par 2"

"The transfer from AT&T and its affiliates to the BOC's, or to a new entity subsequently to be separated from AT&T and to be owned by the BOCs, of sufficient facilities, personnel, systems, and rights to technical information to permit the BOCs to perform, independently of AT&T, exchange telecommunications, and exchange access functions including the procurement for and exchange access functions, including the procurement for, and enginneering, marketing and management of, those functions, and sufficient to enable the BOCs to meet the equal exchange access requirements of Apendix B;" 72,556, 72,557

"BOC Requirements

A. Subject to Appendix B, each BOC **shall provide** to all interexchange carriers and **information service providers exchange access, information access,** and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates."

"B. **No BOC shall discriminate** between AT&T and

its affiliates and their products and services and **other persons and their products and services** in the:

procurement of products and services;
establishment and dissemination of technical information and procurement and interconection standards;
interconnection and use of the BOC's telecommunication service and facilities or in the charges for each element of service;
provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access."
United States v A&TT 552 F. Supp. 131 (1982) page 227

"Applicability and Effect

"The provisions of this Modification of Final Judgment, applicable to each defendant and each BOC, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns, officers, agents servants, employees, and attorneys, and upon those persons in active concert or participation with each defendant, and BOC who receive actual notice of this Modification of Final Judgment by personal service or otherwise. Each defendant and each person bound by the prior sentence shall cooperate in ensuring that the provisions of this Modification of Final Judgment are carried out. **United States v A&TT** 552 F. Supp. 131 (1982) page 227

Bells attorney have bogged down the Appellant complaint with endless proceedings for over six years by stating to all courts and the Michigan Public Service Commission that no one has jurisdiction over the federal

issues. United States Justice Department, Anne. K Bingman, Assistant Attorney General, testimony **(Appendix B)** before the Telecommunications Subcommittee of the House Commerce Committee confirms the Appellants statements as to Bell bottleneck interconnection issues and as in the Appellant case Michigan Bells attorney bogging down the Appellant complaint with endless proceedings which was the standard procedure for all Bell Operating Companies:

> **"The Bell system proved itself adept at devising new ways to use the bottleneck to hurt competition in other markets more quickly than the courts and regulatcry agencies could order solutions**. Among other things the **Bell System used its monopoly profits to hire legions of lawyers to make sure that any proceeding that challenged any aspect of the monopoly was bogged down in endless proceedings**. For example, the struggle to allow telephone customers the right to use their own equipment on their own premises, rather than being forced to purchase the equipment form the Bell System, spanned decades from the beginning of the Hush a Phone litigation in the 1940s to the break up of the Bell System in 1984, which finally resulted in open competition in customer premises equipment . See, e.g., United States v AT&T, 552 F. Supp. At 162-163 (discussing a portion of this struggle –the **Bell System's use of "protective connecting arrangements" to discourage the use of competitors**."

ARGUMENT

I. STANDARDS OF REVIEW

THE TRANSFER OF THE APPELANTS COMPLAINT WOULD ALLOW GTE AND BELL TO DIVORCE **GTE**

CONSENT DECREE AS CITED IN UNITED STATES v AT&T 552 F. Supp 131 (D.D.C. 1982) AFF'D MEM SUB NOM, Maryland v United States, 460 U.S. 10001 (1983) AND THE GTE CONSENT DECREE IN United States v GTE 603 F. Supp 703 (D.D.C.1984), without a judicial review by the District Court of Columbia that has retained jurisdiction for compliance and enforcement of the consent decrees.

The district court's construction of the decree is subject to de novo review. E.g., **United States v WesternElec. Co., 12 F. 3d** 225, 229, 233 (D.C. Cir. 1993) It factual determinations are reviewed under the clearly erroneous standard. Id at 233. Michigan Bell cannot divorce the decree's broad authorization to the Bell Operating Companies to provide any and all information providers exchange telecommunications and exchange access services for the equal access obligations and line of business restrictions. **The corollary of the BOC's receiving AT&T assets and being mandated by the decree to provide to all information providers and exchange access are subject to the "BOCs' Requirements." Imposed by section II of the decree 552 F Supp at 227-28** The attempt by Michigan Bell to challenge an accepted interpretation of the decree at this late date should be met with considerable skepticism. **The decree's section II(a) equal access and section II(B) nondiscrimination requirements, 552 F. Supp. At** 227,were adopted to protect and promote the interexchange competition that AT&T's monopolistic conduct had thwarted. See 552 F. Supp. At 142-143, 195-97. The court found it "imperative that any disparities in interconnection be eliminated so that all interexchange and **information service providers** will be able to compete on an equal basis." **ID at 195**. The decree's "broad guarantee of equal treatment" Bell was ordered by the consent decree to "remove any inter-connection type obstacles to free competition" among

interexchange carriers. Id. At To effectuate this purpose, the equal access and nondiscrimination provisions are to be construed 197 broadly to encompass all potential areas of favoritism, subtle as well as overt, that may arise in relationships between the divested BOCs and AT&T and its competitors." Id **at 142-43** (quoting Competitive Impact Statement); see also **United States v Western Elec. Co.,** 846 F. 3d 1422, 1427-30 (D.C. Cir. 1988) Unlike the line of business restrictions, the equal access and nondiscrimination provisions do not "prevent a potential competitor from entering the market, " **552 F. Supp at 187**. Rather the prohibit conduct that threatens competition by impeding interchange competitors and information providers access to BOC local exchange facilities. Bell has not contested or requested to remove equal access obligations. Contested motions to remove equal access obligations are governed by the common law standards incorporated in Fed. R. Civ P. 60(b)(5), which allows a party to obtain relief only "when it is no longer equitable that the judgment should have prospective application not when it is no longer convenient to live with the terms of a consent decree.: **Rufo v Inmates of Suffolk County Jail,** 502 U.S. 367, 383 (1992) (quoting Fed R. Civ. P 60 (b)(5)

Bell has not requested relief form the decree obligations. A defendant seeking relief from decree obligation bears the initial burden of establishing that a significant change in circumstances warrants revision of the decree. Rufo, 502 U.S. at 383; **AT&T-McCaw Appeal** 46 F. 3d at 1203-04. Even if the defendant meets that burden, it must also show that the modification it seeks "is suitably tailored to the changed circumstances." Rufo, 502 U.S. at 383; AT&T-McCaw Appeal 46 F. 3d at 1204-06

Restrictions in the antitrust decree were imposed to protect the public interest in competition, "may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree have not been full

achieved." **United States v United Shoe Machinery Corp.**, 391 U.S. 244, 248 (1968), cited in Rufo, 502 U.S. at 379, see also **United States v Eastman Kodak Co.**, 195-2 Trade Cas. (CCH) 71,078 at 75,157-58 (2d Cir. 1995); **AT&T McCaw Appeal** 46 F. 3d at 1207. Because the decree's equal access provision are applied to Bell requirements to provide information providers with information access service remain necessary to protect information providers interexchange competition

THE UNITED STATES JUSTICE DEPARTMENT DETERMINATION IS REVIEWABLE BY THE UNITED STATES DISTRICT COURT OF COLUMBIA IN ACCORDANCE WITH THE ADMINISTRATIVE PROCEDURE ACT SECTION 10 THEREFORE THE APPELLANT'S COMPLAINT BELONGS WITH THE UNITED STATES DISTRICT COURT OF COLUMBIA.

The United States Justice Department determination for which there is no other adequate remedy in any court is subject to judicial review as cited in Judicial Review of an Administrative Procedure Act. **"Section 10 of the Administrative Procedure Act became applicable on September 11, 1946 and is applicable from that date to judicial review of agency action"** United States Justice Department passed the Appellants complaint to three different Justice Department attorneys over a 3 year period each stating that they were going to provide assistance and that they needed additional help. United States Justice Department determination did not address the issues presented to it. Any person such as the Appellant that has **suffered a legal wrong because of an agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review as cited by the Administrative Procedure**

Act Section 10 (e) as the following cites:

> Section 10 (e) Reviewable Acts First, it is provided that "Every agency action made reviewable by statute **and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review**. Section 10 (c) provides that **"Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action**. In addition, it would seem that under the common statutory provision that no objection to agency action not urged before the agency shall be considered by the courts, an application for agency reconsideration remains a prerequisite to obtaining judicial review of such objection See 15 U.S.C. 77 (I) and 49 U.S.C. 646 (e).
>
> Section (10) (1) A of the Administrative Procedure Act Right of Review states:
> "**Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.**
> The scope of judicial review is defined in section 10 (e) as follows:

The United States District Court of Columbia is the ruling court for the enforcement of the Bell and GTE consent judgments and the reviewing court regarding the United States Justice Department determination. The United States Court of Appeals failed to allow United States District Court of Columbia as **the reviewing court to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of the consent decrees.** The United States District

Court of Appeals in error failed to allow the Appellant a due process hearing before the District Court of Columbia to allow it to determine all relevant federal questions of law in accordance with consent decrees and the Administrative Procedure Act:

> "So far as necessary to decision and where presented **the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action**. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The United States District Court of Appeals has failed to review the whole record or allow the Appellant to submit its evidence to the District Court in accordance with the Administrative Procedure Act section 10 (e) as the following cites:

> "Finally, **section 10 (e) provides that "In making**

the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." This appears to restate existing law. Specifically, the phrase "whole record" was not intended to require reviewing courts to weigh the evidence and make independent findings of fact; rather, it means that in determining whether agency action is supported by substantial evidence, the reviewing court should consider all of the evidence and not merely the evidence favoring one side. Senate Hearings (1941) p. 1359.

ADMINISTRATIVE AGENCY DETERMINATIONS DO NOT CREATE RESJUDICATA OR COLLATERAL ESTOPPEL EFFECT. THE EXHAUSTION OF ADMINISTRATIVE REMEDIES POSTPONES RATHER THAN PRECLUDES THE ASSERTION OF FEDERAL JURISDICTION.

The United States District Court of Columbia as a reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) **contrary to constitutional right, power, privilege or immunity**; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; unsupported by substantial evidence in any case subject to the requirements reviewed on the record of an agency hearing provided by statute or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making therefore going

determinations the court shall review the whole record or such portions therefore as may be cited by any part due account shall be taken of the prejudicial error. 60 Stat 243-244, 5 U.S.C. 1009 (e) (348 U.S. 492, 503) The exhaustion of administrative remedies postpones rather than precludes the assertion of federal jurisdiction.: **Comment Exhaustion of State Administrative Remedies in Section 1983 Cases**, 41 U. Chi L. Rev 537, 551 (1974)

BELL HAS DELIBERATELY MISREPRESENTED AND CONSEALED THE TRUE FACTS REGARDING THE BELL FACILITIES THAT ARE IN EXISTENCE AND ITS REQUIREMENTS TO PROVIDE THE APPELLANT WITH SERVICE AND ACCESS TO THE FACILITIES THAT IT PROVIDES TO AT&T AND ITS OWN INFORMATION PROVIDERS. BELL USED ITS MONOPOLY CONTROL TO DENY THE APPELLANT A COMPETITOR THE INTERCONNECTION TO THE LOCAL END OFFICE FACILITY AND IS CONSEALING THE FACTS TO THE COURT. THE UNITED STATES DISTRICT COURT ORDERED THE ESSENTIAL FACILITIES TO BE PROVIDED TO INFORMATION PROVIDERS. THE ALLEDGE VIOLATIONS OF THE COURT ORDER ARE REVIEWABLE DISTRICT COURT OF COLUMBIA

Michigan Bell has always provided its own information providers and AT&T information providers the end office switching and interconnection through the established Grand Rapids end office while at the same time it refused to provide the Appellant with the same access. Bell has concealed the existence of the end office to this court. This end office switching system provides access to the entire 616 network and connects to all other areas throughout Michigan as the following states:

"A telephone user can originate or receive communications to or from the network via an end office. The basic function of the network is to provide communication paths between originating customer terminal equipment and terminating customer equipment. If the originating and terminating customers are served by the same switching system, the communications path is through the one switching system only. If the customers are served by different switching systems in same LATA, the communications path is established via the intrLATA network. Bell Operating Company Notes on Local Exchange Company Network 1994 Network Design and Configuration."

Bell provides the end office for companies located in the Bell LATA as stated below. Bell denied the Appellant as a competitor the same end office it offers its customers by creating entry barriers and refusing to provide the Appellant with service. United States Department of Justice cited in the Michigan Overview and Descriptions of Local Competitors that Bell provides access to its own customers but has set up entry barriers for competitors like the Appellant by refusing to provide end office Bell controlled facility as the following states:

"Michigan is the nation's eighth most populous state, with over 9.5 million inhabitants and is the second most populous state in the (Bell) Ameritech region. City of Grand Rapids has a population of 190,000 with some 1 million persons in its metropolitan area. These urban concentrations could reasonably be expected to attract local telephone competition in the absence of entry barriers.

"Brooks Fiber Communications entered the

Michigan local exchange/access marketing as a competitive access provider in Grand Rapids it purchased City Signal. Brooks provides 31% of its own access lines in Michigan obtaining the remaining 69% from (Bell) Ameritech, so Brooks is the principal user of unbundled loops obtained from Ameritech in Michigan. Brooks relies on Ameritech for least some facilities, primarily loops, to reach 75% of all of its customers, including 61% of its business customers and **90%** of its residential customers.

BELL'S REFUSAL TO PROVIDE THE APPLELANT THE NECESSARY INTERNCONECTION FOR THE APPELLANTS SERVICE ARE THE EXACT IDENTICAL ISSUES THAT BELL WAS REFUSED AS OF MAY 21, 1997 TO PROVIDE IN REGION LONG DISTANCE SERVICE. BELL FAILED TO MEET A VARIETY OF LEGAL REQUIREMENTS DESIGNED TO OPEN LOCAL TELEPHONE MARKET TO COMPETITION LIKE THE APPELLANT. THE UNITED STATES DISTRICT COURT OF COLUMBIA HAS JURISDICTION FOR COMPLIANCE AND ENFORCEMNT OF THE CONSENT DECREES THEREFORE TRANSFER OF APPELLANT CASE WOULD DENY THE REVIEW OVER THE INTERCONECTION ISSUES THAT THE DISTRICT COURT OF COLUMBIA HAS RETAINED JURISDICTION FOR.

No court has reviewed the federal consent judgments that orders Bell and GTE to provide information provider like the appellant with service. Bell stalled the Appellant case for over six years by pleading to the court that they had no jurisdiction over the Appellant case until Michigan Public Service Commission reviewed the issues. Bell then pleaded

to the Michigan Public Service Commission that it did not have jurisdiction over the federal issues. Bell's refusal to provide the Appellant the necessary interconnection and service are the same exact identical issues that the Department of Justice concluded (Bell) Ameritech was still in violation. United States Justice Department concluded that the Michigan Bell Ameritech: **Appendix C)**

> "**Was not providing two "competitive checklist" items unbundled switching, which allows competitors to direct the routing of calls and local transport, the system that actually carries local calls**.
>
> "Had not shown that it had adequate systems for providing resale services and unbundled elements to its competitors, as required by the Telecom Act".
>
> **"Had not shown that it had fully resolved certain interconnection problems, which caused calls between an Ameritech (Bell) customer and a competitor's customer to be blocked** more frequently than were calls from one Ameritech customer to another Ameritech customer"
>
> "Needed to improve the measurement of its performance in providing resale services and unbundled elements to its competitors, so that parity and nondiscrimination can be assured."

APPELLANT HAS FILED AN APPLICATION FOR RECONSIDERATION WITH THE UNITED STATES JUSTICE DEPARTMENT ON JANUARY 18, 1997

The United States Justice Department, attorney, Brent Marshall has since its determination stated that it may have made an error as to federal violations of law. There was **no**

statement made by the United States Justice Department to be interpreted as intended to preclude, judicial review of the federal violations. Thus the United States District Court of Columbia , Justice Department and the Administrative Procedure Act expressly provides for an exclusive method of judicial review of the United States Justice Department determination and the phone companies refusal to provide the Appellant with Service. Wayne Foster of the United States Justice Department Freedom of Information Department has stated to the Appellant that the United States Department of Justice has failed to act in behalf of the small Information Provider throughout United States. The invalidity of Justice Department enforcement procedures is subject to review.

UNITED STATES DEPARTMENT OF JUSTICE HAS MADE A RECORD WITH A VIEW TOWARD (A) RECONSIDERATION BY THE AGENCY ITSELF, AND (b) PROVIDING AN ADEQUATE FACTUAL RECORD AS THE BASIS FOR JUDICIAL REVIEW BY THE COURT. THE ADMINISTRATIVE PROCEDURE JUDICIAL REVIEW ACT PROVIDES THE DEPARTMENT OF JUSTICE DETERMINATION RECORD AS THE BASIS FOR JUDICIAL REVIEW BY THE COURT AS THE FOLLOWING STATES:

> " There are many situations in which the invalidity of agency action may be set up as a defense in enforcement proceedings. On the other hand there are special statutory arrangements under which Congress has provided for immediate and continuous enforcement **while the exclusive route to judicial review is by first exhausting an administrative procedure, in such an agency proceeding, the agency and the parties make a record with view**

toward (a) reconsideration by the agency itself, and (b) providing an adequate factual record as the basis for judicial review by a specific court See United States v Ruzicka, supr."

"Section 10 d confers upon every reviewing court discretionary authority to stay agency action pending judicial review to the extent necessary to prevent irreparable injury"

MICHIGAN BELL REFEUSED TO PROVIDE THE APPELLANT WITH INTERCONNECTION TO THE GRAND RAPIDS ESSENITAL FACILITIES. BELL WAS ORDERED TO PROVIDE THE NECESSARY FACILITIES AS MANDATED BY THE CONSENT DECREE. THE REFUSAL TO PROVIDE THE NECESSARY FACILITIES WOULD REQUIRE A JUDICIAL REVIEW BY THE DISTRICT COURT OF COLUMBIA THEREFOR THIS CASE SHOULD NOT BE TRANSFERED TO THE WESTERN DISTRICT.

Bell refused to provide the Appellant with interconnection to end office switch facility. Bell refused to provide the Appellant full and nondiscriminatory access to the defendants facilities and services. More specifically, Appellant interconnection claims fall into three categories: (1) Bell wrongful denials of access to Bell transmission facilities (2) Bell wrongful denials of access to local interconnections which would have enabled Appellant to provide it information provider service. (3) Bell discriminatory and unreasonable terms and conditions with respect to the provision of local distribution facilities in as much as Bell provides service to AT&T and its own information providers.

Bell refused to provide interconnection arrangements, the Appellant was refused as a competitor to be able to offer their customers the ability to make a calls to the Appellant

service and to receive from the Appellant its messages for a price. The Appellant case has challenged the Bell and GTE's specific practices the have refused the Appellant opportunities as a competitor to enter the market as an information provider. The remedy that Bell and GTE agreed to forbid all of the practices, and more. By the courts eliminating the Appellant unreasonable restraints, the remedy will provide important benefits to the public by eliminating artificial barriers to entry that Bell and GTE imposed to prevent competition in the information provider operating system market.

BELL, GTE AND THE MICHIGAN PUBLIC SERVICE COMMISSION REFUSING TO PROVIDE THE APPELLANT WITH SERVICE ARE AT THE VERY HEART OF THE DECREES OBLIGATIONS AND THE DISTRICT COURT OF COLUMBIA RETAINED JURISDICTION TO ENFORCE. THERE FOR THE APPELLANT CASE BELONGS WITH THE DISTRICT COURT OF COLUMBIA FOR REVIEW.

The AT&T antitrust consent decrees provides a structural remedy for the anticompetitive conduct of GTE and Bell Telephone. GTE and Bell have refused to provide the Appellant with service in accordance with the consent decrees. The consent decree is to be construed as a contract as the following states:

> "The basic principles that govern construction of antitrust consent decree are well established. A consent decree is be construed for enforcement purposes basically as a contract United States v ITT Continental Baking Co 420 U.S. 223, 238 (1975) accord, United States v Western Elec. Co., 900 F.2d 293: United States v Western Elec. Co., 846 f 2d 1422, 1427 (D.D.C), cert. Denied, 488 U.S. 924 (1988); United States v Western Elec., 797 F. 2d

1082, 1089 (D.C. Cir. 1986), cert denied, 480 U.S. (1987). In construing a decree, the Court " is guided by conventional aids to construction including the circumstances surrounding formation of the consent order and any technical meaning words used may have had to the parties. United States v Western Elec. Co., 900 F. 2d at 292 quoting United States v ITT Continental Baking Co., 420 U.S. at 238. General usage also is an accepted aid to construction; common terms that are not expressly defined in the decree are to be construed in their natural sense, United States v Armour & Co., 402 U.S. at 238) General usage also is an accepted aid to construction; common terms that are not expressly defined in the decree are to be construed in their natural sense United States v . Armour & Co., 402 U.S. 673, 578 (1971) and in accord with their normal meaning. See United States v Atlantic Refining Co., 360 U.S. 19, 23 (1959). A court may not read into a decree proscriptions that the parties did not agree upon United States v Western Elec. Co., 797 F. 2d at 1089-91 even if doing so might satisfy the purposes of one of the parties to the decree," id. At 1089 (quoting United States v Armour & Armour & Co., 402 U.S. 673, 682 (1971) see also United States v Western Elec., 894 F. 2d 430."

Section II (D) of the AT&T and Bell consent decree prohibits those situations in which (a BOC) would have substantial incentive and ability unfairly to impede competition by use of its monopoly position in the market it is entering. Court in proposing this decree, the parties explained that its purposes were to dismantle the integrated Bell System and to prevent the BOCs from recreating similar potentially anticompetitive corporate structures See generally, **United States v Western Elec. Co.,** 552 F . Supp

at 165-166 **Competitive Impact Statement** , 47 Fed Reg.7170, 7173-74, 7176 (1982) ("CIS") Response of the United States to Public Comments on Proposed Modification 47 Fed reg. 23320, 23323, 23335 (1982) U.S. Response) In doing so, they expressly eschewed judicial regulation in favor of structural relief, see 552 F. Supp at 166- 68 Cis, 47 Fed Reg at 7181 and they recognized that the decree would not remove all risks of anticompetitive conduct in the telecommunications industry. See **ReU.S. sponse**, 47 Fed Reg. At 23323.

The 1982 consent decree entered in the government's antitrust case against AT&T required AT&T to divest its local telephone the Bell Operating Companies ("BOCs") 552 F. Supp at 226-27 Section I (D) of the decree provides that, after the divestiture, the decree requires Bell Operating Companies to provide equal access and nondiscrimination . Michigan Bell has refused to provide the Appellant as an Information Provider equal access to the Grand Rapids end office interconnection facility while at the same time allowing its information providers complete access to the Appellants customers and relevant market.

Effective interconnection arrangements are among the most critical issues for information providers like the Appellant that are facilities based competitors. The Appellant and any other competitors must be able to offer their customers the ability to make calls to and receive calls from anybody else who owns a phone most notably Bell customers. Without such interconnection, the Appellant or any other competitor's service essentially would be worthless. Bell and AT&T Information Providers had interconnection through the established end office that the Appellant needed and Bell refuse to provide .Bell refuse to provide the switches that would be programmed to complete the calls for use of the Appellant.

Bell's additional circuits from its switch to its customers and the Appellant. It is discriminatory for Bell to refuse to

offer the Appellant use of its switches while the same location switches are offered to AT&T and Bell's own information providers access to the end office switches. Competition has been adversely affected because of Bell's control over the monopoly facilities allows it to offer such a feature while preventing its competitors from doing the same. Nondiscrimination as it applies to the consent decree means, however that Bell could not hinder competitors offering such services by refusing to provide service by using both the loops and ports, including switching services, the same location features it offers to its own subscribers; since Bell facilities are handling the entire call, there is no apparent reason why the same features could not be made available. The court function is not to determine whether the resulting array of rights and **liabilities** is one that will best serve society, but only to confirm that the resulting consent decrees mandates Bell GTE to provide the Appellant and other information providers with service.

"Plaintiff established the necessary facilities to handle the incoming calls with equipment obtained and maintained by plaintiff. Plaintiff states without dispute that its equipment could handled approximately six million calls with equipment obtained and maintained by plaintiff' United States District Court Opinion Page 5 par 1.

Statement of Facts The Decree Provisions are at Issue. Therefore the Appellant's complaint should be properly directed to the reviewing court that has retained jurisdiction over the consent decrees which is the United States District Court of Colmbia.

The 1982 AT&T antitrust consent decree required AT&T to divest its local telephone operating companies, the BOCs MFJ I, 552 F. Supp at 226-27. Under the decree the BOCs are required to provide "equal access " to information

providers like the Appellant., to access to BOC exchange services "on an unbundled, terrified basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates," and it prohibits the BOC's form discriminating between AT&T and other information providers in providing products and service and services. **MFJ II (a) & B,** 552 Supp. At 227. The 1982 AT&T decree states the Bell requirements on page 227 section II BOC requirements:

Subject to Appendix B, **each BOC shall provide to all** interchange carriers and **information providers service exchange access, information access, and exchange services for such access on an unbundled, terrified basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates**.

No BOC shall discriminate between AT&T and its affiliates and their products and the service and **other persons and their products and services in the**:

1. procurement of product and services;

establishment and dissemination of technical information and procurement and interconnection standards;

service interconnection and use of the BOC's telecommunications and facilities or in charges for each element of service and

The provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access.

Within six months after the reorganization

specified in paragraph I(A) (4) each , each BOC shall submit to the Department of

Justice procedures for ensuring compliance

with the requirements of paragraph B.

Absent Equal Access Safeguards, Bell Market Power in the Information Provider Service has anticompetive Effects in the Market for Information Provider Services to all customers and the District Court of Columbia has retained jurisdiction over these issues.

United States District Court of Columbia retained jurisdiction to review Bell and GTE equal access requirements. Of course, implementation of equal access imposed costs on AT&T and the Bell Operating Companies, but those costs were inherent in the remedy chosen by the parties. The district court found this remedy consistent with the public interest because the costs were warranted by the resulting benefits to competition and consumers. The information equal access requirements, moreover, are not substantially more onerous than they were when the decree was entered. Information Access requirements have been in place since 1984, and Bell Operating Companies have prospered. Bell has failed to give each subscriber an equal access choice to a competitor like the Appellant which would produce a significant cost saving for consumers. But that contention has not been disputed by Bell and the District court is not obligated to accept the Bell view of evidence.

The decree's section II (A) equal access II(B) nondiscrimination requirements, 552 F. Supp. At 227, were adopted to protect and promote the information and interexchange competition that AT&T monopolistic conduct had thwarted. **See 552 F. Supp. At** 142-43, 195-97 The court found it "imperative that any disparities in interconnection be eliminated so that all information providers and interexchange and information service providers would be able to compete on an equal basis.: **Id. At 195**. The decree's

broad guarantee of equal treatment" was intended to "remove any interconnection type obstacles to free competition among information providers. To effectuate this purpose, the equal access and nondiscrimination provisions are to be construed broadly to encompass all potential areas of favoritism, subtle as well as overt that may arise in relationships between the divested Books and AT&T and it competitors." **Id. At** 142-43 (quoting Comparative Impact statement) see also **United States v Western Elec co.,** 846 F. 3d 1422 1427-30 (D.C.Cir. 1988).

GTE HAS REFUSED TO PROVIDE THE ESSENTIAL FACILITIES AND HAS JOINED UP WITH BELL TO BOYCOTT THE APPELLANT IN JUNE OF 1996. THE DISTRICT COURT OF COLUMBIA HAS RETAINED JURISDICTION TO REVIEW GTE'S CONSENT DECREE.

"Both the Bell Operating Companies and the GTE Operating Companies are required under the respective decrees to provide equal access to competing information service providers, and they are prohibited from discriminating against any such competitors" United States v GTE Page 732

Every scenario for the emergence of competition assumes continuing dependence upon Bell, at least for interconnection and in many cases for end office loops and other network elements as well essential facility. Under the consent decree as discussed in Section II. B unbundling of loops and ports is important to local competition because it obviates the need to replicate the Local exchange Bell entire network of distribution facilities. Unbundling is intended to address the Bell monopoly power to require Bell to provide all information providers like the Appellant with service.

Bell refused to allow the Appellant exchange access to the end office where Bell maintains its switches and loops to

reach the Appellant relevant geographic market area. Bell used the Appellant local end office exchange facility to exclude the Appellant from reaching its customers. This end office barrier is under Bell's control. Bell promised, by its consent to the consent judgment to eliminate the end office barrier there by encouraging the competition that could be served as predicated by the consent judgment.

BELL, GTE AND THE MICHIGAN PUBLIC SERVICE COMMISSION HAVE VIOLATE THE APPELLANTS FIRST AND FIFTH AMENDMENT RIGHTS

The United States Congress and the United States District Court have ordered that all information providers like the Appellant are to be provide with service in accordance with the MFJ. Because the must provide or must carry provisions impose special obligations upon the phone companies to provide the Appellant as an information providers with service their refusal lies at the heart of the First Amendment as the following cites:

> **"Such a development would strike at a principle which lies at the heart of the First Amendment: that the American people are entitled to a diversity of sources of information.** United States v American Tel. And Tel. Co. cite at 552 F. Supp 131 (1982) page 224 par 1. In determining whether the proposed decree in public interest, the court must take into account the decree's effect on other public policies, such as the First Amendment principle of diversity in dissemination of information to the American public See Part II supra. Consideration of this policy is especially appropriate because as the Supreme Court has recognized, in promoting diversity in sources of of information , the values

underlying the First Amendment coincide with policy of antitrust law. FCC v National Citizens Committee for Broadcasting, supra. 436 U.S. at 800, n. 18, 98 S. Ct at 2114, n. 18. United States v American Tel. And Tel. Co. 552 F.Supp. 131 (1982) page 184

The goal of the First Amendment is to achieve "the widest possible dissemination of information form diverse and antagonistic sources: Associated Press v United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945). See also FCC v National Citizens Committee for Broadcasting, 436 U.S. 775, 795, 98 S. 2096, 2112, 56 L.Ed. 2d 697 (1978) This interest in diversity has been recognized time and again by various courts. In Red Lion Broadcasting, v FCC 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.ED.2d 371 (1969) for example, the Supreme Court observed that it is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market. See also New Your times Co. v Sullivan 276 U.S. 254, 270, 84 S. Ct. 710, 720, 11 L.Ed. 2d 686 (1964) Judge Learned Hand, speaking for the Court of Appeals for Second Circuit, similarly noted that the media serve one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as possible United States v Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y.1943) affd 321 U.s. 1, 64 S.Ct. 397, 88 L.E 497 (1945.) United States v American Tel. And Tel. Co. 552 F.Supp. 131 (1982)

Appellees refusal to provide the Appellant with service violates the Due Process Clause of the Fifth Amendment by stripping the Appellant of their vested rights to provide its

information to the public. The Court has long recognized the rights telecommunication providers like the Appellant to provide their information to the public and that the widest possible dissemination of information from diverse and antagonistic sources is essential to the public . **Associated Press v United States**, 326 U.S.1, 20. Safeguarding the public right to receive a diversity of views and information in therefore integral component of the Court and Congress mission, serves important First and Fifth Amendment values, and is at the very least, an important governmental objective that is sufficient basis for the policies in question. Appellees have unconstitutionally abrogated the right of the Appellant to provide its service The Appellant has shown misconduct on the part of Appellees that rises to the level of actual misrepresentationor concealment.

DISCOVERY

Appellant has requested with a motion for discovery and a **motion to compel discovery** the necessary evidence, admissions, and other documents that the Appellees have refused to provide. The Appellant has still been unable to obtain the documents requested after a motion to compel discovery with the court.

The Appellant has requested with three separate letters in accordance with the freedom of information act facts from the United States Justice Department. The United States Justice Department has failed to provide any information based upon the Appellants requests. Michigan Bell, GTE, and the Michigan Public Service Commission have refused to provide the Appellant any of the requested necessary documents.

The evidence, admissions, and other documents are necessary to obtain a full fair hear for any court to determine the violations of the consent decrees. A fair hearing is essential to the due process and Fourth Amendment rights of the Appellant; without it, there is condemnation without trial.

The right to such a hearing is one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement.

SUMMARY

The Appellant request the consent decrees be used as prima facie effect as to the obligations of Appellees to provide the Appellant with service. The consent judgment states:

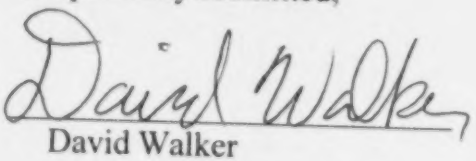
> "Prima Facie Effect of the Decree in Private Litigation Section 5 (a) of the Clayton Act 15, U.S.C. 16 provides that a final judgment rendered in any proceeding brought by the United States under the antitrust laws to the effect that a defendant has violated such laws shall be prima facie evidence against such defendant in a private action as to all matters respecting which said judgment would be an estoppel as between the parties there to." United States v American Tel. And Tel. Co. 552 F.Supp. 131 (1982) page 210.

The United States District Court of Columbia retained jurisdiction for the enforcement of compliance herewith, and for the punishment of any violation of the consent decrees. Appellant requests a full fair hear before the United States District Court of Columbia to determine the violations of the consent decrees. There has been a infringement of the Appellants rights under the Fourteenth Amendment. The fundamentals of a trial were denied to the Appellant upon the strength of federal evidential facts of the phone companies refusal to provide service in accordance with the consent judgments.

CONCLUSION

For the Forgoing reasons, the Court should grant this petition for writ of certiorari. Alternatively the Court should vacate the United States Court of Appeals order affirm the consent decrees with a transfer of this case to the court that has retained jurisdiction for compliance and enforcement which is the United States District Court Columbia.

Respectfully submitted,



David Walker
Appellant
5754 Duck Lake
Whitehall, Michigan 49461

Dated: March 2, 1999

APPENDIX
TABLE OF CONTENTS

Appendix A:

FROM UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA:

Amended Order, filed A1

Order Denying
Petition for Rehearing
filed Dec. 19, 1997 ..... A2

Order Denying Suggestion
For Rehearing *In Banc*
filed Dec. 19, 1997 ..... A3

Order Denying Petition
For Writ of Mandamus
filed 11/21/97 ..... A4

Appendix B:

Statement of Anne K. Bingaman,
Assistant Attorney General
Published May 3, 1995 ..... B1-B16

Appendix C:

Newsrelease: Justice Department
Recommends to FCC That It Deny
Ameritech's Application To
Provide Long Distance In Michigan,
Released June 25,1 997 ..... C1-C4

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMENDED ORDER, filed A1

ORDER DENYING
PETITION FOR REHEARING
filed Dec. 19, 1997 ..... A2

ORDER DENYING SUGGESTION
FOR REHEARING *IN BANC*
filed Dec. 19, 1997 ..... A3

ORDER DENYING PETITION
FOR WRIT OF MANDAMUS
filed 11/21/97 ..... A4

Pages A-1 thru A-4

United States District Court
For The District of Columbia

DAVID WALKER, *Plaintiff,*	)	
	)	Civil Action
	)	No. 97-653(GK)
v.	)	
	)	Filed
MICHIGAN PUBLIC SERVICE COMMISSION, et al.	)	Jul 03 1997
	)	Clerk

AMENDED ORDER

On June 25, 1997, this Court issued an Order transferring this matter because venue did not lie in the District of Columbia. However, due to a clerical error, that Order stated that the transfer was to the Western District of Maryland. That was incorrect. The transfer should have been to the Western District of Michigan. Thus, it is this 3rd day of July, 1997 hereby

Ordered, that the Court's June 25, 1997, Order shall be amended. The portion of the Order which reads, "This case shall be transferred to the United States District Court for the Western District of Maryland, in the interest of justice, pursuant to 28 U.S.C. § 1404 (a)" is amended to read, "this case shall be transferred to the United States District Court for the Western District of Michigan, in the interest of Justice, pursuant to 28 U.S.C. § 1404 (a)".

/s/ Gladys Kessler
Gladys Kessler
U.S. District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nº 97-8057 September Term, 1997
97cv00653

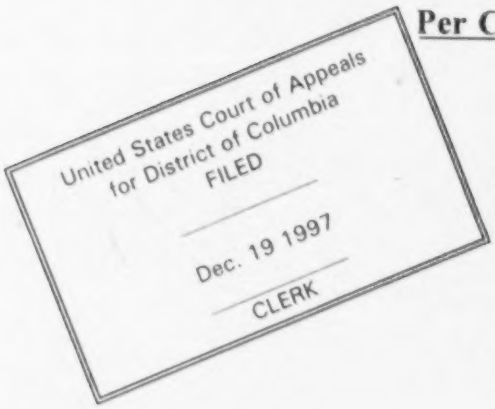
In re: David Walker,
Petitioner

BEFORE: Wald and **Rogers,** Circuit Judges

Upon consideration of petitioner's petition for rehearing filed December 2, 1997, it is

ORDERED that the peition be denied.

Per Curiam



FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

№ 97-8057 September Term, 1997
97cv00653

In re: David Walker,
Petitioner

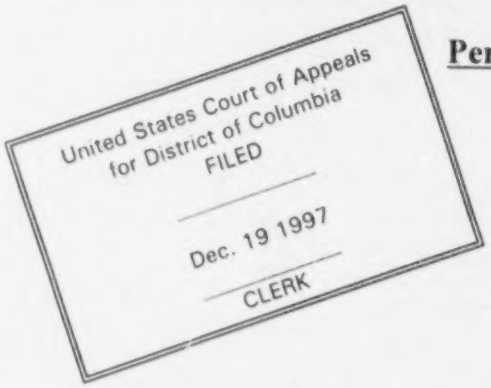
BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

Order

Upon consideration of petitioner's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam



FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

Circuit Judges Ginsburg, Henderson and Garland did not participate in this matter.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

№ 97-8057 September Term, 1997

97cv00653

In re: David Walker,
Petitioner

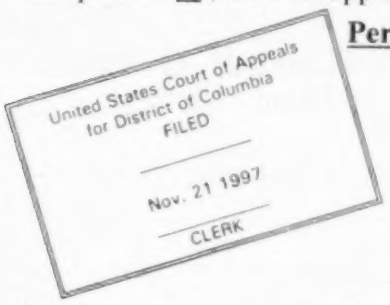
BEFORE: Wald and **Rogers,** Circuit Judges

ORDER

Upon consideration of petition for A WRIT OF MANDAMUS, the court's order filed September 18, 1997, the respondes thereto and the reply, it is

ORDERED that the petition for a writ of mandamus be denied. Mandamus is an extraordinary remedy and only appropriately granted when a petitioner's right to relief is clear and indisputable. See Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34-45 of U.S. V.Western Electric, 578 F.Supp. 677 (D.C.C. 1983), the district court's order transferring petitioner's complaint was proper in light of petitioner's failure to demonstrate a meritorious claim for enforcement or to show that the Department of Justice refused in bad faith to act on his prior complaint. Id., 578 F.Supp at 679-80.

Per Curiam



FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ R.W.; J.M.R.

APPENDIX B

STATEMENT OF ANNE K. BINGAMAN
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION, DEPT. OF JUSTICE

Dist. of Columbia Circuit Case Nº. 97-8057
Statement Published May 3, 1995

Pages B-1 thru B-16

May 3, 1995

Statement of Anne K. Bingaman
Assistant Attorney General
Antitrust Division
Department of Justice

Before the Senate Commerce Committee
Subcommittee on Telecommunications
on §.652
The Telecommunications Competition and Deregulation Act

It is a great honor to testify before this subcommittee, along with Assistant Secretary Irving, on behalf of the Administration concerning one of the most important pieces of legislation this Congress will consider -- S.652, the Telecommunications Competition and Deregulation Act. I congratulate Senators Pressler and Hollings, and their colleagues on the Commerce Committee, for their hard work and constructive efforts in drafting S.652. And I am grateful to you, Mr. Chairman, Senator Leahy and this subcommittee for holding these hearings, exercising leadership in this vital area of our economy and competition policy and proceeding in a bipartisan fashion.

The Administration's fundamental vision for the telecommunications future is simple to state, but breathtaking in its implications: Every company will be permitted to compete in every market for every customer. We want that day to come as soon as possible, because, increased competition in telecommunications will benefit consumers, spur economic growth and innovation, promote private sector investment in an advanced telecommunications infrastructure and create jobs. We would be naive, however, if we expected an uncomplicated transition from

the regulated monopolies that characterize many segments of the telecommunications industry to fully competitive markets.

Vice-President Gore put it best at the Federal-State-Local Telecommunications Summit held earlier this year: "Competition is always better than monopoly. But monopoly power must never be confused with competition. Two enemies of competition are monopoly power and unwise government regulation. We must remember, after all, that the goal we seek is - real- competition. Not the illusion of competition; not the distant prospect of competition."

There is today, we believe, a broad, bipartisan consensus in favor of moving telecommunications policy out of the courts and into the statute books so that Congress, representing the public, can craft the kind of comprehensive framework for competitive telecommunications that the nation deserves. The key test for any telecommunications reform measure is whether it helps the American people. To meet this test, it must be effective in opening all telecommunications markets to competition, including -- first and foremost -- currently monopolized markets. And it must ensure that monopolists cannot harm consumers and competition in the transition to competitive -- and then deregulated -- markets.

Important portions of S.652 are consistent with these goals and with the need to encourage real competition. In many states, today, local telephone competition is still illegal. Thus, the bill's preemption of state entry barriers to local telephone markets is an absolutely essential element of opening those markets to competition. Likewise, the unbundling of local telephone networks that the bill envisions could facilitate the development of meaningful local telephone competition by making it easier for

potential competitors to enter the market.

In several critical respects, however, the bill does not do enough to promote competition and protect consumers. The Administration supports changes to S.652 that would strengthen the bill's promotion of real competition and protection against monopolistic behavior. These changes will help ensure that American consumers actually receive competitive telephone prices, competitive cable prices and more and better quality telecommunications services. They will help consolidate America's position of international leadership in telecommunications and further sharpen the important competitive edge that such leadership gives American businesses.

Three changes in particular are vital to ensure that telecommunications reform achieves deregulation through real competition rather than unleashing monopolies:

- First, cable rates should not be deregulated unless and until they are subject to the discipline of competition.

- Second, subject to limited exceptions, telephone companies should not be able to merge with cable companies in their local service areas and deprive consumers of the benefits of competition between these two wires.

- Third, Bell Company entry into the long distance market should be conditioned on a Department of Justice assessment of actual marketplace facts to ensure that such entry will not unravel a decade of progress in opening that market to competition.

Of these three issues, I will focus my testimony on the importance of a Department of Justice role in approving Bell Company entry into long distance. I also will discuss why the antitrust laws alone cannot protect adequately against anti-competitive mergers by telephone and cable companies who share service areas. Both of these are matters that this subcommittee is especially equipped to address, implicating as they do important issues of competition and the Department of Justice's enforcement of the antitrust laws. Finally, I will highlight several other aspects of S.652 that raise competitive concerns. My colleague, Assistant Secretary Irving, will focus on cable and broadcasting issues.

The History of the Bell System Decree

The seven Regional Bell Operating Companies (Bell Companies), each of which has a monopoly over local telephone service in its respective region, are restricted from entering the long distance market by the Modification of Final Judgment or MFJ, the 1982 consent decree that settled the Department's landmark antitrust case against the Bell System. The danger of the local monopoly was the basis of that case. Before it was broken up, the Bell System was a vertically integrated monopoly. In addition to having a monopoly over the local telephone bottleneck, the Bell System monopolized communications equipment manufacturing, through its Western Electric subsidiary, and monopolized long distance telephone service, through its AT&T Long Lines Department. But the key to maintaining the equipment and long distance monopolies was the Bell System's control over local telephone service for most Americans. *See United States v. AT&T*, 552 F. Supp. 131, 162

(D.D.C. 1982), aff'd sub nom., *Maryland v. United States*, 486 U.S. 1001 (1983). Long after competition in long distance service and communications equipment became technologically and economically feasible, the Bell System abused its control of the local bottleneck to frustrate consumer choice and actual competition.

As Judge Harold Greene, who presided over the eleven month trial of the case and who continues to administer the terms of the MFJ, has explained, it was control of local exchange service

> that gave the Bell System its power over the competition. That control enabled the System to foreclose or impede interconnection to its network of lines of its long distance competitors and of equipment produced by its manufacturing rivals. It also made possible the subsidization of one activity with the profits achieved in another.

United States v. Western Elec. Co., 673 F. Supp. 525, 536 (D.D.C. (1987), aff'd in relevant part, 900 F.2d 283 (1990).

Until the success of the Department's suit, regulation and litigation had not been effective in breaking through that local bottleneck. The Bell System proved itself adept at devising new ways to use the bottleneck to hurt competition in other markets more quickly than the courts and regulatory agencies could order solutions. Among other things, the Bell System used its monopoly profits to hire legions of lawyers to make sure that any proceeding that challenged any aspect of the monopoly was bogged down in endless proceedings. For example, the struggle to allow telephone customers the right to use their own equipment on their own premises, rather than being forced to

purchase that equipment from the Bell System, spanned decades -- from the beginning of the Hush-a-Phone litigation in the 1940s to the break-up of the Bell System in 1984, which finally resulted in open competition in customer premises equipment. *See, e.g., United States v. AT&T*, 552 F. Supp. at 162-63 (discussing a portion of this struggle -- the Bell System's use of "protective connecting arrangements" to discourage the use of competitors' equipment).

The Benefits of Competition After the MFJ

The MFJ addressed the problem of the local monopoly bottleneck and promoted competition in the long distance and equipment manufacturing markets by strictly separating the local monopoly from those markets. Competition in those two markets subsequently exploded. The result has been dramatically lower prices, better quality and more choice for American businesses and consumers.

MCI, Sprint and hundreds of smaller carriers vie with AT&T to provide long distance service to businesses and residences. The New York Times recently reported that in 1994 more than 25 million residential customers changed long-distance carriers -- spotlighting the MFJ's incredible success in bringing real choice to consumers. Residential long distance rates have fallen some 50 percent since the break-up of the Bell System. The United States now has four fiber optic networks spanning the country, another byproduct of competition. Incidentally, AT&T lagged behind its competitors in building a fiber optic network -- not surprising given that monopolists often are not the most innovative companies. These networks make possible all kinds of new services and enhance others, including the Internet.

Similarly, businesses and consumers enjoy lower prices, more choice and better quality in communications equipment, as competition has eroded AT&T's power in that market and forced it to compete for customers.

Because of lower prices and better quality, Americans are communicating with each other, by phone, fax and computer, more than ever before. We are closer to each other and in better touch with each other, for business and pleasure, because of the MFJ and its benefits.

Allowing the Bell Companies into Long Distance

Section VIII(C) of the MFJ provides that any Bell Company may obtain a waiver of the line-of-business restriction as soon as it can show that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter. Judge Greene has granted over 250 such waivers. In fact, just last week, Judge Greene approved a waiver request made by all the Bell Companies and supported by the Department that will allow the Bell Companies to provide long distance services to their wireless customers. The core restrictions on the Bell Companies' entry into long distance for landline customers and into equipment manufacturing remain, however.

Ideally, we would like to remove these restrictions and al-low the Bell Companies to be able to enter those markets, in keeping with our goal of a future in which every company is free to compete in every market for every customer. The trick, of course, is to ensure that removing the restrictions does not result in the recreation of the old Bell System, this time on a regional rather than a national basis, complete with the incentive and the

ability to impede competition in the long distance and manufacturing markets. Seven separate monopolies, each controlling one large region of the United States, would be scant improvement for the cause of competition over a single national monopoly.

As the Congressional leaders who crafted S.652 apparently agree, the best legislative approach for removing the restraints that keep the Bell Companies out of long distance would be the development of competition in local telephone markets. In drafting S.652, Senators Pressler and Hollings and the other members of the Commerce Committee embraced this approach by requiring the Bell Companies to take specified steps to open the local markets to competition as a condition to entering long distance.

The problem with S.652, however, is that it does not include provisions for testing the effectiveness of those steps in actually enabling local competition. The ultimate effectiveness of any set of steps -- including the steps prescribed in S.652 -- depends on the resolution of dozens and dozens of complicated implementation issues. To say, for example, that a Bell Company must unbundle the elements of its local network begs the questions of the price of the unbundled elements, the relation between those prices and the retail price of the bundled service and what sort of volume discount structure can be applied to either set of prices. Yet, it is the answers to these questions that will determine the marketplace effectiveness of the unbundling.

The history of the Bell System before entry of the MFJ proves that the mind of man cannot anticipate all the ways that a local telephone monopolist can thwart competition. What is needed to ensure that we fulfill the bill's vision of enabling

competition in the local telephone market prior to Bell Company entry into long distance is to measure the effectiveness of the steps taken against actual marketplace facts by asking such questions as: Have competitors been able to enter? Are they able to serve a variety of customers in the geographic area that the Bell Company seeks to serve? Is the availability of such competing service expanding? Are competitors encountering significant barriers to such expansion? How effective are the safeguards? The goal should be a judgment -- based on market facts -- whether Bell Company entry presents a substantial possibility of impeding competition in other markets.

The Need for a Department of Justice Role

The responsibility for making that judgment should be assigned to the Department of Justice. DOJ is the agency with deep competition expertise, the agency whose unwavering focus is on the protection and promotion of competition. It has effectively enforced the antitrust laws in the telecommunications industry on a completely nonpartisan basis throughout this century, including, of course, bringing the suit that dismantled the old Bell System.

It has assisted Judge Greene in administering the MFJ through Republican and Democratic Administrations alike, by reviewing over 350 requests for waivers under Section VIII(C) -- an average of about one every two weeks. Many of the most recent waiver requests have involved complex issues related to the competitive impact of the Bell Companies' provision of long distance services or equipment manufacturing.

Last month, the Department asked Judge Greene to modify the MFJ to permit a limited trial of interexchange service

by Ameritech, one of the Bell Companies, in two cities in Ameritech's service area, once Ameritech faces actual local exchange competition and there are substantial opportunities for additional local exchange competition in those cities. The proposal builds on the idea that one possible basis for lifting the line-of-business restriction is the existence of local competition. The Department's motion was filed along with a stipulation by Ameritech and AT&T that the modification is in the public interest. The proposed modification represents an unprecedented consensus of industry participants, originating from a proposal by a Bell Company and now supported by major long distance competitors, local competitors, state regulators and consumer groups.

The proposed modification is the product of thousands of hours of staff work by the Department over the course of more than a year, including several rounds of public comment, as well as intensive discussions with Ameritech, state regulators, potential competitive local exchange carriers, long distance carriers and consumer groups. During that process, the Department deepened its already extensive expertise in telecommunications competition and its understanding of the competitive implications of Bell Company entry into long distance. Earlier this week, we filed our brief in support of the motion, and hope that Judge Greene will agree with us that the modification is in the public interest.

In short, the Department's experience working with the MFJ uniquely positions it to assess what is actually happening in the market and whether there is a danger that entry by the Bell Companies could impede competition in other markets.

Thus, the Administration strongly believes that S.652 should be amended to provide for a DOJ role in reviewing

proposed Bell Company entry into long distance. In conducting that review, the Department should apply the test found in Section VIII(C) of the MFJ: whether Bell Company entry into long distance presents no substantial possibility of impeding competition in that market. The VIII(C) test focuses on market realities, not theoretical presumption. Moreover, it is well-understood, having been considered and applied by the Department and by the courts numerous times since the entry of the MFJ.

Assigning to DOJ the responsibility of applying the VIII(C) test will not slow the process of Bell Company entry into long distance -- except to the extent that such entry would be harmful to competition and thus undesirable in the first instance. We support legislation that would provide that DOJ apply the test by a date certain -- within a specified period after filing of a Bell Company application -- completing its analysis during the same time frame and on the same schedule as the FCC applies its public interest test.

Perhaps more important, adoption of the VIII(C) test will result in a long term savings of resources. Bell Company entry that occurs without assurances that the entry presents no substantial possibility of impeding competition in long distance likely will result in the proliferation of complex, expensive antitrust and other suits under federal and state law, suits that will consume resources better spent on competing to offer American businesses and consumers better service and higher quality. Applying a marketplace test as a condition to entry will avoid this waste.

Assigning DOJ the role of applying VIII(C) also would save resources by bringing DOJ's expertise directly to bear on

the question of Bell Company entry. Requiring the FCC to filter the Department's antitrust analysis on such a critical issue would be grossly inefficient because it would cause the FCC to duplicate expertise that DOJ already possesses and analysis already done by DOJ.

Finally, DOJ responsibility for applying the VIII(C) test has enjoyed widespread support. The Senate Commerce Committee last year approved it by a vote of 18-2. Likewise, more than 420 members of the House of Representatives voted in favor of it just one year ago. It is an intelligent, effective approach to putting consideration of competitive facts and analysis at the center of our telecommunications reform efforts.

Extending the Competitive Checklist

The Administration believes that S.652 places too much faith in the competitive checklist. Although the checklist certainly will be helpful, there is no basis for believing that any checklist drawn up in advance can anticipate the myriad implementation issues that effective unbundling and interconnection will entail. The reality is that, to date, virtually no one in this country or the world has any actual experience with what can only be described as an exceedingly complicated undertaking. It is a myth that a simple formula can guarantee competition and replace the need for an expert analysis of real marketplace competitive developments. Recognition of the need for experience in this vitally important new undertaking is one of the principal reasons that the Department is recommending to Judge Greene that the Court adopt the proposed modification on a trial basis in Chicago, Illinois, and Grand Rapids, Michigan.

The bill prevents the FCC from extending the terms of the competitive checklist. The uncertainty that pervades the entire effort to open the local market to competition counsels against carving a checklist in stone in advance without allowing ourselves the opportunity to learn from experience and expand the checklist as the important but as yet almost wholly untested transition to competition proceeds.

Competition Between Cable and Telephone Companies

My colleague, Assistant Secretary Irving, will discuss the Administration's views on the cable and broadcasting provisions of S.652, but I did want to address briefly the provisions of the bill that would allow mergers and joint ventures between telephone companies and cable systems in the telephone companies' local service area. Permitting such mergers could undermine potential competition between the "two wires" before it begins, potentially raising telephone and cable prices paid by consumers and leaving antitrust litigation as virtually the only potential barrier to anti-competitive behavior.

Expensive, complex litigation is not the way to promote competition. It would invite a host of judicially determined outcomes in districts around the country. The result may well be that some Americans will enjoy the benefits of a competitive, "twowire" world, while others will be saddled with one monopolist providing both cable and telephone service.

The absence of a prohibition of buyouts within the same service area also could result in the antitrust enforcement agencies being inundated with cable-telephone company merger filings. Litigation of contested mergers is extremely resource

intensive; the antitrust authorities may be hard pressed to protect the public from an onslaught of anticompetitive mergers if more than a small fraction of the 12,000 cable systems in the U.S. choose to merge with their local telephone company. The cost to consumers of anticompetitive mergers could be huge, and we will have lost an historic opportunity to promote competition in the delivery of both telephony and cable programming.

For these reasons, the Administration continues to support a strong ban on acquisitions and joint ventures between a telephone company and cable systems in the telephone company's local service area, subject to an exception for case-by-case review in rural areas and authority for the FCC to review the ban after a certain number of years and modify it if competitive conditions change.

Additional Important Issues Concerning Competition

I am attaching to my testimony a white paper that discusses in some detail other Administration concerns regarding S.652. Let me highlight several of those concerns:

- The Administration believes that the bill should not allow a Bell Company to obtain relief from the MFJ restrictions by showing that it has entered into merely "an" interconnection agreement that satisfies the "competitive checklist" in the bill; this provision could render the competitive checklist largely irrelevant, because a Bell Company may not need to enter into interconnection arrangements with all, or even several, of its competitors, and may not need to reach agreement

with any significant competitor before seeking and securing long distance entry.

- The Administration believes that the bill should not dictate to the States which form of rate regulation best protects State consumers under the different circumstances and levels of competition that develop in each State.

- The Administration believes that legislation should not preempt state efforts to open the multibillion dollar, currently monopolized intraLATA toll market to competition.

- The Administration believes that legislation should not condition the joint marketing of long distance and resold local services by competitors on Bell Company entry into long distance service; such a provision unnecessarily extends regulation to currently unregulated companies that have no power to impede competition.

Conclusion

I am proud that our country and this Congress have the courage to take on the tough issue of telecommunications reform. It took a lot of courage to break up the Bell System's vertical monopoly and allow competition into the markets for long distance and equipment manufacturing. But we did and as a result we now lead the world in telecommunications.

The easy thing, of course, would be for us stay where we are today. That, however, is not the American way. We

welcome the challenge of striving toward a future of open telecommunications markets. But let us confront that challenge in the wisest way possible, and that is by making real competition our guide. The changes supported by the Administration add the focus of competition to the broad vision of S.652. If amended and strengthened in the ways outlined here, we believe the bill can and will lead the Nation to prosperity in the 21st Century.

APPENDIX C

NEWSRELEASE:
JUSTICE DEPARTMENT RECOMMENDS TO FCC
THAT IT DENY AMERITECH'S APPLICATION
TO PROVIDE LONG DISTANCE IN MICHIGAN

Dist. of Columbia Circuit Case Nº. 97-8057
Statement Released June 25, 1997

FOR IMMEDIATE RELEASE AT
WEDNESDAY, JUNE 25, 1997

(202) 616-2771
TDD (202) 514-1888

JUSTICE DEPARTMENT RECOMMENDS TO FCC THAT IT DENY AMERITECH'S APPLICATION TO PROVIDE LONG DISTANCE IN MICHIGAN

Ameritech has made Important Progress Towards Opening Local Phone Markets in Michigan--But Not Enough to Satisfy the Law's Requirements, Justice Says

WASHINGTON, D.C. -- The Department of Justice today recommended that the Federal Communications Commission deny an application by Ameritech to provide long distance service in Michigan, because Ameritech has not fully completed the legally required steps to open local telephone markets there to competition. In comments filed with the FCC, the Department did, however, note that Ameritech has made significant progress towards opening local telephone markets in Michigan.

> "As a result of Ameritech's efforts and cooperation with the Department, as well as the State of Michigan's leadership in removing legal and economic barriers to entry, local competition is beginning to take root in Michigan," said Joel I. Klein, Acting Assistant Attorney General for the Department's Antitrust Division.
>
> "Though it has met several of the necessary conditions for entry, Ameritech has yet to meet all the law's requirements, including the items set out by Congress in the competitive checklist. Nor has Ameritech demonstrated that its markets are fully and irreversibly open to competition."

Following the break up of the integrated Bell system as part of the AT&T divestiture, the independent Bell Operating Companies, or BOCS, were barred from providing long distance services in their respective region as part of the Modified Final Judgment, or MFJ, in the AT&T case.

In 1995, the Department, Ameritech, AT&T, and other parties proposed a waiver of the MFJ, on a trial basis, to allow Ameritech to enter the in-region, long distance market once it had instituted a series of market opening measures and demonstrated that actual competitive opportunities were expanding. Though it never went into effect, this trial, called the "Customers First" plan, was an important step in the continuing, collective efforts of Ameritech, the Department, and the State of Michigan to open local markets in the state to competition as a means to lower prices, enhance service offerings and improve service for telephone customers.

As today's filing explains, implementing the complex processes that will be needed to facilitate local competition will take time and considerable effort. Though the progress towards opening the Michigan local market to competition has been substantial, Ameritech has yet to make the necessary demonstration to warrant in-region, long distance entry.

Under the Telecom Act, the BOCs are presently barred from offering in-region long distance service. Specifically, Section 271 of the Act prohibits a BOC, such as Ameritech, from providing in-region long distance services until it demonstrates to the FCC that it has met a variety of legal requirements designed to open the local telephone markets in a particular state to competition.

In considering whether to approve a BOC's application for long distance authority in a particular state, the FCC must consult with the Justice Department and give "substantial weight" to its assessment as to whether the BOC should be allowed to provide in-region long distance service.

In its evaluation of Ameritech's application, the Department concluded that Ameritech:

> Was not providing two "competitive checklist" items--unbundled switching, which allows competitors to direct the routing of calls and local transport, the system that actually carries local calls--in the manner required by orders of the FCC and the Michigan Public Service Commission.
>
> Had not shown that it had adequate systems for providing resale services and unbundled elements to its competitors, as required by the Telecom Act.
>
> Had not shown that it had fully resolved certain interconnection problems, which caused calls between an Ameritech customer and a competitor's customer to be blocked more frequently than were calls from one Ameritech customer to another Ameritech customer.
>
> Needed to improve the measurement of its performance in providing resale services and unbundled elements to its competitors, so that parity and nondiscrimination can be assured.

Ameritech filed its application with the FCC on May 21, 1997. Under the Telecom Act, the FCC must approve or deny the application by August 19, 1997.

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